

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
PARK ROW ELECTRONICS & CAMERA, INC.	:	DETERMINATION
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period December 1, 1980	:	
through November 30, 1983.	:	

Petitioner, Park Row Electronics & Camera, Inc., c/o Isaac Sternheim & Co., 5612 18th Avenue, Brooklyn, New York 11204, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1980 through November 30, 1983 (File No. 801360).

A hearing was commenced before Dennis M. Galliher, Administrative Law Judge, on December 7, 1988, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, and concluded before Robert F. Mulligan, Administrative Law Judge, at the same location on March 28, 1990, with all briefs to be submitted by December 19, 1990. Petitioner appeared by Isaac Sternheim, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Michael Gitter, Esq., of counsel).

ISSUE

Whether the sales tax audit properly determined petitioner's sales and use taxes due.

FINDINGS OF FACT

Petitioner, Park Row Electronics & Camera, Inc., operated a retail store and mail order business selling cameras and electronic equipment during most of the period at issue. The business closed on September 19, 1983, when petitioner made an assignment for the benefit of creditors. Leopold Lefkovits was president of petitioner.

The Audit

(a) An examination of petitioner's business was commenced on November 17, 1983,

when the auditor mailed a letter scheduling an audit appointment for November 29, 1983. The letter was mailed to petitioner's last known address, 1 Park Row, New York, New York 10038, and was returned by the Postal Service as undeliverable.

(b) The auditor checked the Manhattan telephone directory and found that petitioner's address was listed as 30 Ann Street. He called the telephone number shown in the directory and learned that the telephone had been disconnected.

(c) On November 29, 1983, the auditor went to the 30 Ann Street location and was told by the building manager that petitioner had recently moved out. The auditor found that the space which petitioner had been occupying was vacant.

(d) Also on November 29, 1983, the auditor went to petitioner's former business premises at 1 Park Row and was told by the new tenant that petitioner's attorney was Israel Weinstock. The auditor called Mr. Weinstock the same day and was told that petitioner's accountant, Henry Hirsch, had all of the records of the corporation.

(e) The auditor called the accountant and scheduled an appointment for December 8, 1983, at the accountant's office. The auditor kept the appointment and was told by Mr. Hirsch that the records were not available. A new appointment was scheduled for December 12, 1983, at the accountant's office. On December 9, 1983, the accountant called and cancelled the appointment. A new appointment was scheduled for December 21, 1983. On that date, the auditor went to the accountant's office and waited from about 9:30 A.M. to about 11:00 A.M. but the accountant failed to keep the appointment.

(f) On January 31, 1984, the auditor's supervisor spoke to an accountant named Harry Bram, who was Mr. Hirsch's partner. Mr. Bram said that all records were with the firm of Richard A. Eisner & Co., accountants for petitioner's creditors, and would not be available for months. It appears that it was at this point that the Division of Taxation learned that petitioner had made an assignment for the benefit of creditors.

(g) On February 1, 1984, petitioner, by S. Lefkovits, as officer, executed a Consent Extending Period of Limitations for Assessment of Sales and Use Taxes extending the period of

limitations for the period December 1, 1980 through May 31, 1981 to September 20, 1984.

(h) On April 25, 1984, the auditor called Mr. Hirsch and was told by the accountant that petitioner was no longer his client. Mr. Hirsch suggested that the auditor call Leopold Lefkovits, petitioner's president, at a certain telephone number. On that same day the auditor called the telephone number and spoke to a man who identified himself as the brother of Leopold Lefkovits, whom, the man said, would return the call the next day. The auditor, however, did not receive such call.

When the auditor did not receive a telephone call from Leopold Lefkovits, he prepared an estimated assessment as follows:

(a) First, gross sales for the quarters ending February 28, 1981, May 31, 1981, August 31, 1981 and November 31, 1983 were estimated at \$463,976.00 per quarter, by averaging gross sales reported for the other eight periods.¹ Total audited gross sales were determined to be \$5,567,714.00. The auditor did not have the tax returns or copies thereof, but apparently worked from computer records of data contained on the returns.

(b) Audited gross sales were then increased by 25% to "protect" against the possibility that if books and records were eventually produced, they might show that gross sales were greater than reported.

(c) The above method resulted in audited taxable sales of \$6,959,643.00 and tax due of \$569,820.78. As tax paid was \$51,117.98, additional tax due was \$518,702.80.

On May 2, 1984, notices of determination and demands for payment of sales and use taxes due dated May 1, 1984 were mailed to petitioner at the 1 Park Row address and to Leopold Lefkovits, individually and as officer of petitioner, at 1163 51st Street, Brooklyn, New York 11219, for the following amounts: tax due for the period December 1, 1980 through November 30, 1983 of \$518,702.80, penalty of \$110,389.09, interest of \$129,739.04, for a total due of \$758,830.93.

On May 9, 1984, the auditor received a telephone call from a Mr. Gross who identified

¹Exhibit H, worksheets, page 8.

himself as petitioner's new accountant and said that he would try to have the books and records available before the 90-day period for protesting the assessment expired.

(a) The auditor examined petitioner's available books and records on August 7, 1984 at the offices of Richard A. Eisner & Co., the creditors' accountants.

(b) The books and records available on that date were the cash receipts journal, the check disbursements journal, and the purchases journal.

(c) Audited gross sales for the period December 1, 1980 through November 30, 1983, were found to be \$6,166,409.00. Gross sales for the quarters ending November 30, 1981, February 28, 1982, August 31, 1982, February 28, 1983 and May 31, 1983 were based on sales per the cash receipts journal. Gross sales for the quarters ending May 31, 1982, November 30, 1982 and August 31, 1983 were taken from the returns filed. Gross sales for the quarters ending February 28, 1981, May 31, 1981, August 31, 1981 and November 30, 1983 were estimated based on petitioner's taxable sales reported. The check disbursements journal showed that petitioner had made payments for shipping charges for goods shipped out of New York, although no shipping documents were produced. Consequently, the auditor reduced audited gross sales by 50% to allow for out-of-state sales. The auditor conceded at the hearing that the reduction was an arbitrary one. He testified that the Division of Taxation was trying to be reasonable, in view of the fact that petitioner was no longer in business and the assessment was large.²

(d) The 50% out-of-state sales factor reduced audited taxable sales to \$3,083,205.00 for the audit period.

(e) Sales tax due was computed to be \$252,057.58. Use tax on fixed assets was found to be \$22.72. Expense purchases were found to be negligible, therefore no test of expenses was made.

(f) After allowing for \$51,117.98 in tax paid, the tax due was reduced to \$200,962.32.

On September 27, 1984, the Division of Taxation issued a Notice of Assessment Review

²Transcript, page 74.

to petitioner showing adjusted tax due of \$200,962.32, plus adjusted penalty and/or interest of \$108,554.85 for a total due of \$309,517.17.

Business Operations

It is clear, from the documentary evidence introduced by petitioner at the hearing, that petitioner operated a sizeable mail order business in addition to its retail store. Analysis of the evidence shows the following:

(a) The ledgers of mail order transactions for the period January 1, 1982 through July 31, 1983 (Exhibits 1 and 2) show that petitioner made mail order sales to virtually every state and also to Puerto Rico, the Virgin Islands, and Canada. Mail order sales in New York City were negligible.

(b) The United Parcel Service pick-up record and parcel register, covering the period January 14, 1983 to June 1, 1983 (Exhibit 3) appears to confirm the validity of the entries made in the mail order ledgers.

(c) Telephone bills and cancelled checks (Exhibit 4) and the testimony of petitioner's president, show that petitioner had WATS line (800 number) service from the beginning of the audit period until it went out of business in September 1983.

Petitioner advertised with monthly full-page advertisements in the national magazines Modern Photography and Popular Photography. Petitioner also advertised in High Fidelity magazine and sometimes advertised in newspapers such as The New York Times and The Village Voice.

Petitioner's president estimated that 80% to 85% of petitioner's business was from out of state.³

The officer listed on petitioner's sales tax certificate of authority was Leopold Lefkovits, president, 1051 55th Street, Brooklyn, New York 11219.⁴

³Transcript, page 141.

⁴It is noted that this address is different from that to which the officer assessment was mailed (Finding of Fact "4").

Sales Tax Returns Filed

Eight of the sales tax returns are in the record. The type of business shown on each return is as follows:

<u>Quarter Ending</u>	<u>Type of Business</u>
2/21/81	Mail Order - Camera Stores
5/31/81	Mail Order Camera
8/31/81	Mail Order - Cameras
11/30/81	Mail Order - Camera
2/28/82	
5/31/82	Selling retail and wholesale
8/31/82	
11/30/82	

The eight returns in the record show the following breakdown of sales:

<u>Quarter Ending</u>	<u>Gross Sales</u>	<u>NYC Sales</u>	<u>NYC Tax</u>	<u>New York State Sales Outside New York City</u>	<u>NYS Tax Outside NYC</u>
2/28/81		\$67,186.00	\$5,374.88	\$8,937.00	\$585.22
5/31/81		50,492.00	4,039.37	5,743.00	373.92
8/31/81		80,486.00	6,438.89	8,573.00	544.26
11/30/81	\$617,815.00	60,593.00	4,998.92	5,476.00	366.15
2/28/82	586,973.00	61,763.00	5,095.47	6,023.00	373.09
5/31/82	512,404.00	39,040.00	3,220.74	5,879.00	394.16
8/31/82	451,420.00	73,345.00	6,050.92	3,758.00	245.20
11/30/82	453,227.00	40,555.00	3,345.79	4,986.00	330.88

CONCLUSIONS OF LAW

A. Tax Law § 1138(a) (former [1]) provided, in pertinent part, as follows:

"If a return required by this article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available. If necessary, the tax may be estimated on the basis of external indices, such as stock on hand, purchases, rental paid, number of rooms, location, scale of rents or charges, comparable rents or charges, type of accommodations and service, number of employees or other factors."

B. Where a taxpayer's records are incomplete or insufficient, the Division of Taxation may select a method reasonably calculated to reflect the sales and use taxes due and the burden then rests upon the taxpayer to demonstrate by clear and convincing evidence that the method of audit or amount of tax assessed was erroneous (Surface Line Operators Fraternal Organization, Inc. v. Tully, 85 AD2d 858).

C. Petitioner's complete books and records were clearly unavailable for audit;

consequently, it was proper for the Division of Taxation to estimate petitioner's sales pursuant to Tax Law § 1138(a) (former [1]). The auditor made a more than reasonable effort to review petitioner's books and records prior to issuing the assessment. It is noted that the appointment letter was mailed to the last address used on petitioner's sales tax returns, 1 Park Row, as provided for by Tax Law § 1147(a)(1). The auditor visited not only that location, but also petitioner's subsequent location at 30 Ann Street. He interviewed the building manager at 30 Ann Street and the owner of the business that succeeded petitioner at 1 Park Row, eventually obtaining the name of petitioner's attorney and accountant. Petitioner's position that it was unaware of the audit is untenable. The auditor contacted petitioner's attorney and accountant, as well as the accountants for petitioner's creditors, and a waiver was signed by an officer of the corporation on February 1, 1984. Moreover, a man who identified himself as the brother of petitioner's president told the auditor he would give a message to the president to call the auditor, although no such call was received.

D. Under Tax Law § 1132(c) it is presumed that all of a taxpayer's sales are subject to tax until the contrary is established. The burden of proving that a sale is not taxable is on the taxpayer.

E. Petitioner has not sustained its burden of proof to show that the Division of Taxation improperly limited petitioner's out-of-state sales to 50% of gross sales. The original assessment treated all sales as taxable to New York and, while the auditor's treatment of 50% of sales as out-of-state sales was admittedly arbitrary (Finding of Fact "6[c]"), it was the reduction that was arbitrary, not necessarily the assessment. It is noted that from the mail order ledgers and other documents offered by petitioner at the hearing (which were not available to the auditor, even at the time of the reduction of the assessment), it is clear that petitioner had a very sizable mail order business. It is impossible to tell from the record, however, what portion of petitioner's sales were made in New York and what portion were out of state.⁵

⁵It appears that under Matter of Reference Library Guild (Tax Appeals Tribunal, August 4, 1988), even if it were clear at the time of audit that petitioner conducted a national mail order business, the auditor could have disallowed all of petitioner's purported out-of-state sales, if

F. Nevertheless, there are three adjustments which must be made:

(1) While the Notice of Assessment Review resulted in a reduction of tax because of the 50% allowance for out-of-state sales, gross sales used in the revised assessment were actually \$598,695.00 greater than those found upon audit. The auditor's increase of gross sales by 25% in calculating the original assessment, however, was arbitrary and did not constitute a reasonable method of audit. This arbitrary increase may not be used to secure a contingently higher determination of gross sales, which is what the auditor attempted to do (Finding of Fact "3[b]"). Accordingly, audited gross sales for the period December 1, 1980 through August 31, 1983 are reduced to the amounts of gross sales reported, plus the average gross sales found for the quarters for which petitioner reported only taxable sales, a total of \$5,103,738.00.⁶

(2) As petitioner terminated its business operations on September 19, 1983, and was not in business in the latter part of September, or in October and November, gross sales for the quarter ending November 30, 1983, are determined to be 20.88%⁷ of the original estimated gross sales for said quarter of \$463,976.00 (Finding of Fact "3 [a]"), or \$96,878.19.

(3) Since 10.4% of petitioner's reported New York sales were delivered outside New York City,⁸ the tax rate on a similar portion of adjusted audited taxable sales is to be reduced from the 8% and 8¼% rates imposed. If it is not possible for the Division of Taxation to allocate the tax by taxing jurisdiction, an average rate of 6.5% is to be applied.⁹

G. The petition of Park Row Electronics & Camera, Inc. is granted to the extent set forth

petitioner failed to submit direct documentary evidence substantiating such sales.

⁶Exhibit H, worksheets, page 8.

⁷Based on 19 days out of the 91 days in the quarter.

⁸Based on average New York City sales and average outside New York City sales shown on the eight sales tax returns in the record (Finding of Fact "13").

⁹Based on an average of reported sales outside New York City and outside New York City tax paid, as shown on the eight sales tax returns in the record (Finding of Fact "13").

in Conclusion of Law "F", but except as so granted, the petition is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes due issued to petitioner May 2, 1984, as modified by the Notice of Assessment Review issued to petitioner September 27, 1984, is otherwise sustained.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE